81-1017
No.____

SUPREME COURT, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS,
CLERK

In The Supreme Court of The United States

October Term, 1981

PETER M. KENDALL

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Barton C. Sheela, Jr.
Christopher J. Schatz
SHEELA, LIGHTNER & CASTRO
3104 Fourth Avenue
San Diego, California 92103
Telephone: (714) 291-4500
Counsel for Petitioner

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1981

No. _____

PETER M. KENDALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, PETER M. KENDALL, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above case on August 31, 1981.

QUESTIONS PRESENTED

1. Whether Petitioner's Fourth Amendment rights were violated by the actions of government agents in conducting a warrantless search of his suitcase.

2. Whether the Court below unconstitutionally redefined the concept of reasonable expectation of privacy in determining that Petitioner voluntarily abandoned his suitcase.

PARTIES BELOW

William H. Kennedy
United States Attorney

Bruce R. Castetter
Assistant United States Attorney
Chief, Appellate Section
Criminal Division

Raymond Edwards, Jr.
Assistant United States Attorney

James McCabe, Esq.
Attorney for Co-Defendant

Gerald A. Akers
Co-Defendant

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	2
PARTIES BELOW	2
TABLE OF AUTHORITIES	4
OPINION BELOW	6
JURISDICTION	6
CONSTITUTIONAL PROVISIONS INVOLVED	7
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE WRIT	15
CONCLUSION	25
APPENDIX "A" - Opinion of the Ninth Circuit Court of Appeals	26

TABLE OF AUTHORITIES

Cases	Page
Abel v. United States, 362 U.S. 217 (1966)	17
Katz v. United States 389 U.S. 347 (1967)	17
Lurie v. Oberhauser, 431 F.2d 530 (9th Cir. 1970)	23
Robbins v. California, ___ U.S. ___, 101 S.Ct. 2841 (1981)	19
Smith v. Maryland, 442 U.S. 735 (1979)	20
United States v. Colbert, 474 F.2d 174 (5th Cir. 1973)	18
United States v. Jackson, 544 F.2d 407 (9th Cir. 1976)	23
United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1970)	22
United States v. Williams, 569 F.2d 823 (5th Cir. 1978)	24
Walters v. United States, 447 U.S. 649 (1979)	21
Statutes:	
Title 21, United States Code Section 841(a)(1)	7
Title 21, United States Code Section 846	7

Title 28, United States Code
Section 1254(1) 7

Constitutions:

United States Constitution,
Fourth Amendment 8

Rules:

Rules of the Supreme Court,
Rule 1 7.1 7

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals of August 31, 1981, is not reported at this date but is set forth verbatim in Appendix "A" at pages 26 through 44.

JURISDICTION

On August 31, 1981, the Court of Appeals for the Ninth Circuit entered judgment affirming the criminal conviction of Petitioner for conspiracy and possession of cocaine with intent to distribute in violation of Title 21, United States Code, Sections 846 and 841(a)(1). The same Court denied a petition for rehearing on October 29, 1981. The jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1) and Rule 17.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In an indictment, the grand jury for the Southern District of California charged Petitioner and his co-defendant with conspiracy and possession of cocaine with intent to distribute in violation of Title 21, United States Code Sections 846 and 841(a)(1). Petitioner pled not guilty and moved to suppress evidence seized by government agents from his suitcase. The

trial court denied the motion. Following a stipulated facts trial, the court found Petitioner guilty and imposed a sentence of four years and a $2,500.00 fine. Petitioner appealed to the Ninth Circuit Court of Appeals and his conviction was affirmed on August 31, 1981. A petition for rehearing was denied on October 29, 1981.

The facts of the case are as follows:

On October 17, 1979, San Diego Narcotics Task Force (NTF) Agent Edward K. Petrick was informed by narcotics agents in Fort Lauderdale, Florida, that there were possibly two cocaine carriers en route to San Diego on National Airlines Flight 39. (R.T. 4-7. All page references herein are to the reporter's transcript.). The Fort Lauderdale agents advised Agent Petrick that these two individuals were seen together as they approached the

terminal but then separated and checked their bags at different areas. (R.T. 5) Agent Petrick was given a description of the two persons and advised that their names were KENDALL and Akers. (R.T. 6)

Following the receipt of this information, Agent Petrick summoned additional NTF agents to the airport for the purpose of establishing surveillance of arriving flights. (R.T. 7) Agent Petrick also required the assistance of a narcotics detector dog from the United States Customs Service. (R.T. 7) All NTF agents were briefed on the descriptions of the two individuals, the bags they had checked and the claim stub numbers on each bag. (R.T. 7)

Upon arrival of Flight 39, Agent Petrick accompanied by two other agents and the dog, took up a position in the baggage handling area and awaited the

unloading of the baggage. (R.T. 8) When the baggage loading cart arrived, Agent Petrick found a suitcase which matched the description although not the claim ticket numbers provided by the Fort Lauderdale agents. (R.T. 8) The dector dog failed to alert to this suitcase. (R.T. 10-11) The dog was then allowed to peruse the remainder of the luggage on the cart. (R.T. 8) He alerted to two other suitcases both of which matched the physical description and claim number of those observed in the possession of KENDALL and Akers at Fort Lauderdale. (R.T. 8-9) These were examined and placed on the luggage carousel with the rest of the luggage from Flight 39. (R.T. 9)

Meanwhile, KENDALL and Akers were observed by other agents as they exited the plane and walked into the terminal. (R.T. 17) After leaving the terminal for

a brief moment, KENDALL walked to the baggage claim area and awaited the unloading of Flight 39. (R.T. 18-19) Akers joined KENDALL and each acknowledged the other's presence. (R.T. 19) As the luggage began to arrive, KENDALL picked up his suitcase and left the terminal proceeding to the taxi line. (R.T. 20, 89)

KENDALL walked to the second cab in line and engaged the driver in conversation. (R.T. 21) NTF Agent Perkins approached KENDALL, identified himself as a law enforcement officer conducting a narcotics investigation and asked KENDALL to accompany him to his office. (R.T. 21) As they approached the terminal, Agent Perkins observed other agents approach Akers. (R.T. 22) Perkins had KENDALL stop and wait outside the terminal while the other agents talked to Akers.

(R.T. 22) KENDALL then sat his suitcase down on the sidewalk and reached for his wallet. (R.T. 22) KENDALL removed the baggage claim ticket from his wallet and informed the agents that his name was not on the name tag which appeared on the suitcase. (R.T. 22, 93) Agent Perkins testified that KENDALL stated, "That suitcase is not mine." (R.T. 22) The name which appeared on the suitcase was "Estarda" or "Estrada". (R.T. 43) One of the agents verified that the claim numbers did not match. (R.T. 42)

Subsequent to this exchange on the sidewalk, KENDALL and Akers were taken to the NTF office while agents returned the suitcase KENDALL was carrying to the National Airlines baggage claim area and retrieved the luggage bearing the claim numbers received from the two individuals. (R.T. 42, 43, 53) Upon arrival at the NTF

office, KENDALL and Akers were advised of their Constitutional rights and agreed to talk. (R.T. 23, 45) Both individuals consented to a search of the luggage which the agents had brought from the baggage claim area. (R.T. 25, 104) The search of the two bags revealed nothing that was chargeable. (R.T. 34-35) Neither KENDALL nor Akers consented to a search of the suitcase KENDALL originally claimed and which was subsequently found to contain cocaine. (R.T. 104, 113) KENDALL and Akers were then released. (R.T. 36, 43)

Later, NTF agents returned to the National Airlines baggage claim area for the purpose of retrieving the suitcase that KENDALL had originally taken out of the airport and that had subsequently been returned to the custody of the airlines. (R.T. 35, 82) The airline representative at the baggage claim area

released the suitcase to the NTF agent after being advised of the agent's identity and that a narcotics investigation was being conducted. (R.T. 84) Upon examining the suitcase in the NTF office the agents discovered that it was secured with a combination lock. (R.T. 46) Unsuccessful in their attempts to manipulate the lock, the agents forced the suitcase open with a screwdriver. (R.T. 46) Inside the agents discovered various articles of ladies' clothing and three plastic, hermetically sealed bags containing coffee and a white powdery substance later determined to be cocaine. (R.T. 46-47) The agents did not have either a search warrant or consent to search this suitcase. (R.T. 35-36, 53-54)

Approximately forty-five minutes after opening the suitcase NTF agents contacted National Airlines in an effort

to locate the person whose name appeared on the identification tag. (T.R. 36-37) Agents also attempted to locate the address appearing on the tag. (R.T. 26, 36) Their efforts were unsuccessful. (R.T. 36-37) KENDALL testified that the address placed on the suitcase was not his (R.T. 91) and that the name he used actually belonged to an acquaintance. (R.T. 97) Akers possessed the claim ticket for this suitcase. (R.T. 91, 96, 103)

After KENDALL and Akers left the airport that evening, they made several attempts to reclaim the suitcase containing the cocaine. (R.T. 113)

REASONS FOR GRANTING THE WRIT

To resolve the following claim of Petitioner:

That at the time of the warrantless seizure and search by government agents Petitioner retained a reasonable

expectation of privacy in his luggage by virtue of the personal property being placed in the custody of a common carrier.

Any discussion of Fourth Amendment issues must begin with the fundamental premise that warrantless intrusions by government agents violating a person's reasonable expectations of personal security and privacy are per se unreasonable. Katz v. United States, 389 U.S. 347, 357 (1967). The correct focus in the instant case is whether Petitioner possessed a reasonable expectation of privacy in his suitcase at the time of its warrantless seizure from the airlines and subsequent search.

A person who voluntarily abandons his property relinquishes any standing to object to its search and seizure thereby giving up his reasonable expectation of privacy in that property. Abel v. United

States, 362 U.S. 217, 240-241 (1960). Abandonment is essentially a matter of intent and as in all other areas of the law intent must necessarily be inferred from "words spoken, acts done, and other objective facts." United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973). The court below in applying these basic principles to the facts presented by the instant case framed the essential issue as follows:

> The primary question on appeal is whether abandonment is to be determined by reference to subjective intent or by reference to the objective manifestation of an individual's intent, i.e., whether a subjective or an objective test applies.

The court was of the opinion that Petitioner was arguing a test based upon subjective intent alone, this test being contrary to established Ninth Circuit precedent which required application of

an "objective test". The court misconstrued Petitioner's position and as a result failed to address the core issue presented.

Petitioner's contention is simply that, insofar as his luggage had been returned to the custody of National Airlines prior to being seized and searched by government agents, it was objectively reasonable for Petitioner to retain a subjective expectation that the luggage would not be subject to search absent a warrant.1/ Petitioner and Akers retained in their possession the means whereby the suitcase could have been reclaimed from National Airlines. (R.T. 111) Petitioner had reason to believe that the suitcase would be retained by the airlines and his

---

1/ Items of luggage are fully protected from warrantless searches under the Fourth Amendment. Robbins v. California, ___ U.S. ___, 101 S. Ct. 2841, 2846 (1981).

privacy protected. Nothing occurred to contradict the reasonableness of this expectation.

The interplay of subjective intent and objective assessment of circumstances (as perceived in accordance with normative expectations informed by the concerns of Fourth Amendment jurisprudence) advanced by Petitioner's argument tracks the logic of Fourth Amendment analysis presently utilized by this Court. In Smith v. Maryland, 442 U.S. 735, 740-41 (1979), Justice Blackmun's opinion for the Court noted:

> Consistently with Katz, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action . . . This inquiry, as Mr. Justice Harlan aptly noted in his Katz concurrence, normally embraces

> two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," . . . -- whether, in the words of the Katz majority, the individual has shown that "he seeks to preserve [something] as private." . . . The second question is whether the individual's subjective expectation of privacy is "one that society" is prepared to recognize as 'reasonable.'" . . . -- whether, in the words of the Katz majority, the individual's expectation, viewed objectively, is "justifiabl[e]" under the circumstances . . . (Citations omitted.)

The reasonableness of retaining an expectation of privacy in articles left in the custody of a common carrier, as against warrantless governmental seizure and search, has previously been recognized. Walters v. United States, 447 U.S. 649, 658-59 (1979). However, the court below attempted to rebut the reasonableness of such an expectation, stating:

> Even if appellants' claim that by their scheme involving the "Estrada" bag they fully intended to retrieve the suitcase in the event Kendall was stopped, Kendall's words and conduct involving the mismatching claim check clearly conveyed, and the narcotics agents reasonably inferred, that Kendall had no reasonable expectation of privacy in the bag, i.e., that he abandoned it.

This apologetic statement does not comport with the facts. If the agents had not subsequently decided that the bag belonged to Petitioner, the bag would never have been removed from the custody of National Airlines personnel and forced open. In each of the cases cited by the court in support of its position, an act of abandonment occurred when articles were either left or disclosed in plain view (see, e.g., United States v. McLaughlin, 525 F.2d 517, 519 (9th Cir. 1975)) or explicitly disclaimed at the point of actual seizure and search (see,

e.g., Lurie v. Oberhauser, 431 F.2d 330, 333 (9th Cir. 1970)). The standard cited by the court as controlling (from the opinion in United States v. Jackson, 544 F.2d 407 (9th Cir. 1976)) specifically delineates the "time" of search as a factor governing determination of the question of abandonment. In Jackson, the court stated that the question of abandonment "rests . . . on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it AT THE TIME OF THE SEARCH." Id. at 408 (emphasis added).

In the instant matter, "at the time of the search" the luggage had been removed from the custody of the airlines personnel. Petitioner's conduct had not propelled the item into the public domain, or into the hands of law enforcement agents. The

bag had not been left unattended in the open field subject to inspection by any passing person, including the police (cf. United States v. Williams, 569 F.2d 823, 826 (5th Cir. 1978)). Rather, prior to its seizure the bag had been returned to the custody of the airlines where Petitioner could reasonably expect it to remain until claimed or seized under warrant.2/

The decision of the court below ignores aspects of fact and law which

---

2/ The Court states that, on the basis of Petitioner's conduct, "the narcotic agents reasonably inferred, that Kendall had no reasonable expectation of privacy in the bag, i.e., that he abandoned it." The result of an act of abandonment is, in most instances, to propel an article directly into the possession of law enforcement agents. Hence, there is no need for "inference" on the agents' part. However, where a constitutional question as to the existence or not of a reasonable expectation of privacy must be decided, Fourth Amendment law requires that decision be made by a magistrate and not by law enforcement agents.

previously defined the concept of abandonment in relation to a central Fourth Amendment concern -- protecting an individual's reasonable expectation of privacy. In seeking to realize a result consonant with its own view of "public policy", the court has failed to perceive that its opinion constitutes an open invitation to ignore settled Fourth Amendment doctrine whenever circumstances may be manipulated to realize or produce certain forms of conduct on the part of suspects. The brazenly illegal search conducted by government agents in this case should not be condoned. The standard principles of Fourth Amendment law should be applied to this matter, not to reward Petitioner, but to insure that those principles shall not become mere platitudes.

CONCLUSION

For the foregoing reasons, Petitioner PETER M. KENDALL respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

DATED: 11-9-81

Respectfully submitted,

SHEELA, LIGHTNER & CASTRO
Attorneys for Petitioner
PETER M. KENDALL

By: _____
Barton C. Sheela, Jr.

By: _____
Christopher J. Schatz

James McPherson
Certified Legal
Research Assistant

Appendix "A"

UNITED STATES of America,

Plaintiff-Appellee,

v.

Peter M. KENDALL,

Defendant-Appellant.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Gerald A. AKERS,

Defendant-Appellant.

Nos. 80-1306, 80-1312.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted October 8, 1980.

Decided August 31, 1981.

Appeal from the United States District Court for the Southern District of California.

Before NELSON and BOOCHEVER, Circuit Judges and WILLIAMS,* District Judge.

SPENCER WILLIAMS, District Judge:

Appellants Kendall and Akers appeal their convictions for conspiracy and possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1). Following denial of their motions to suppress the contraband by the trial court, defendant-appellants waived trial by jury and on March 14, 1980 were found guilty on stipulated facts. Using an objective test standard as determinative for intent to abandon, the trial court found appellants had abandoned the suitcase containing the cocaine,

---

* Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

thereby relinquishing any reasonable expectation of privacy in it. Consequently, the court found that appellants lacked standing to complain of the subsequent warrantless search. We agree with the lower court's use of the objective test to determine abandonment and affirm both the denial of the motions to suppress and the convictions.

Factual Background

On October 17, 1979, San Diego narcotics agents were alerted by Fort Lauderdale, Florida narcotics agents that appellants were flying to San Diego for the supposed purpose of delivering cocaine. The San Diego agents were given descriptions of appellants as well as descriptions of their luggage and appellants were placed under surveillance upon their arrival in San Diego. At the baggage claim area, appellant Kendall

picked up a suitcase meeting the description given to the agents and upon leaving the terminal, was stopped and requested to return to the terminal for questioning. While accompanying the agents, Kendall removed his baggage claim check from his wallet and informed them that his name was not on the suitcase name tag and that the claim check numbers did not match. The name on the bag was "Estrada" or "Estarda". At trial Kendall admitted that the purpose of his words and conduct was to give the officers the impression that he had no interest in the bag. Believing Kendall's disclaimer, one of the agents returned the "Estrada" bag to the baggage carousel and returned with a similar bag whose numbers matched Kendall's claim check. In the meantime, appellant Akers was stopped as he followed and observed Kendall. Although Akers was

not questioned regarding the "Estrada" bag, both appellants consented to a search of their suitcases. Nothing chargeable was found and they were released. However, unknown to the agents, Akers carried the claim check for the "Estrada" bag but he made no attempt to retrieve it before leaving the airport.

Subsequently, the agents checked the passenger list and determined that no passenger named "Estrada" or "Estarda" had been on the flight. Although they did not have a search warrant, they picked up the "Estrada" bag from the baggage claim area and upon returning to their office, forced it open and found approximately three pounds of cocaine in hermetically sealed plastic bags.

After leaving the airport, appellants made several attempts to reclaim the bag. At trial they testified that although

Kendall owned the "Estrada" suitcase, they jointly packed it and each owned some of the cocaine.

Abandonment

Intent to retain a reasonable expectation of privacy is determinative of abandonment. United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976). A person who voluntarily abandons property has no standing to complain of its search and siezure. Abel v. United States, 362 U.S. 217, 240-41, 80 S.Ct. 683, 697-698, 4 L.Ed. 1019 (1960). The primary question on appeal is whether abandonment is to be determined by reference to subjective intent or by reference to the objective manifestation of an individual's intent, i.e., whether a subjective or an objective test applies. Appellants contend that subjective intent is the proper test, that their scheme

involving the identical "Estrada" suitcase is evidence of their intent to return for the suitcase and, therefore, that there was no abandonment. Consequently, they argue that their motions to suppress were erroneously denied. However, appellants misread the opinion of this court in United States v. Jackson, 544 F.2d 407 (9th Cir. 1976) and they disregard pre-Jackson cases which use objective standards to determine intent to abandon.1/

The Objective Standard

United States v. Jackson, provides that the question of abandonment:

1/ See United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1975), cert. denied, 427 U.S. 904, 96 S.Ct. 3190, 49 L.Ed.2d 1198 (1976); United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972); Lurie v. Oberhauser, 431 F.2d 330 (9th Cir. 1970).

> is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts. Abandonment . . . rests . . . on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search.

Id. at 409 (emphasis added)(citations omitted). Whether a person entertains a reasonable expectation of privacy is to be determined by objective standards. United States v. Pruitt, 464 F.2d 494, 496 (9th Cir. 1972).

In Jackson, defendant, seeing law enforcement officers approach, dropped his suitcase and began to walk away before being stopped. The court held there was no abandonment because defendant's conduct did not "indicate an intent to abandon the suitcase." Id. at 410. Although the court does not expressly indicate that it used the objective standard, it

did state that "intent may be inferred from words, acts and other objective facts." Id. at 409. Furthermore, the cases cited by Jackson support an objective rather than a subjective test for intent to abandon.2/

In the case at bar, the trial court relied upon the case of Lurie v. Oberhauser, 431 F.2d 330 (9th Cir. 1970), rehearing denied, October 14, 1970, as permitting the objective standard. In Lurie, defendants, suspected of burglary and robbery, were apprehended while waiting for an airlin flight. Their suitcases were retrieved and each airline identification tag was matched with the baggage claim checks held by the

---

2/ United States vs. Maryland, 479 F.2d 566 5th Cir. 1973); United States v. Colbert, 474 F.2d 174 (5th Cir. 1973); United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1975).

defendants. Defendants gave consent to search all the suitcases except one, and each disclaimed both ownership and knowledge of it. A warrantless search of the suitcase revealed the stolen property. A motion to suppress was denied and defendants were convicted. In affirming the convictions, the Lurie court stated:

> The appellants disclaimed any proprietary or possessory interest in the incriminating evidence and by so doing abandoned whatever interest they might have had in the property from possession of the claim check. Having abandoned the suitcase they have no standing to object that the search of the suitcase was not incident to their arrest.

Id. at 333. The court focused on the defendants' disclaimer without inquiring

into defendants' actual state of mind.3/

Similarly, in United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1975), cert. denied, 427 U.S. 904, 96 S.Ct. 3190, 49 L.Ed.3d 1198 (1976) defendants' objective conduct was held determinative of abandonment. Defendants drove a pick up truck suspected of carrying marijuana. As narcotics officers attempted to stop the vehicle, defendants threw four kilos of marijuana from the truck. The court found that defendants abandoned the marijuana and no inquiry was made whether defendants subjectively intended to return for the

---

3/ For further examples of disclaimer of knowledge and ownership as a basis for abandonment see United States v. Canady, 615 F.2d 694 (5th Cir. 1980); United States v. Miller, 589 F.2d 1117 (1st Cir. 1978); United States v. Anderson, 500 F.2d 1311 (5th Cir. 1974); United States v. Colbert, 474 F.2d 174 (5th Cir. 1973).

contraband.

The objective test for abandonment which we think is consistent with Jackson and the cases cited therein is most definitively stated in United States v. Williams, 569 F.2d 823 (5th Cir. (1978). In Williams, narcotics agents followed a truck and trailer driven by defendant and believed to be transporting marijuana. When defendant became aware he was being followed, he drove into a reststop area, unhitched the trailer and drove off. The narcotics agents then made a warrantless search of the trailer and found marijuana. Later that evening defendant returned to the trailer and was arrested. He was subsequently convicted of conspiracy to possess with intent to distribute marijuana. Defendant's conviction was later affirmed on appeal, the court finding that no Fourth Amendment

rights of defendant had been violated by the warrantless search because defendant's conduct objectively indicated an intent to abandon. Id. at 826. Quoting United States v. Colbert, 474 F.2d 174 (5th Cir. 1973) which has similar language to Jackson, the Williams court stated:

> One has no standing to complain of a search or seizure of property he has voluntarily abandoned . . . . Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. . . .

Id. at 826 (emphasis added). The court reasoned:

> In the case at bar [defendant] Williams knew he was followed by government officers. His only conceivable purpose in leaving the trailer unguarded and unlocked in the parking area was to rid himself of the vehicle with its incriminating contents. Perhaps, he retained a hope that he might accomplish two objects: the protection of himself from possession of

> evidence while he was pursued, and the chance of recovery of the trailer if neither the officers nor anyone else took it. . . . Williams was just like the bank robber who having a gun, finds himself pursued, and in his hope of escaping detection throws the gun into a yard -- where, if it is not picked up he might retrieve it. Such conduct is transparently an abandonment of the tight grip of ownership and reliance solely on the feeble hope of reacquisition.

568 F.2d at 826 (emphasis added).

Appellants' Conduct

Examining appellant Kendall's conduct objectively, we find that he abandoned the suitcase containing the contraband prior to the warrantless search. Even if appellants claim that by their scheme involving the "Estrada" bag they fully intended to retrieve the suitcase in the event Kendall was stopped, Kendall's words and conduct involving the mismatching claim check clearly conveyed, and the narcotics agents reasonably inferred, that Kendall had no reasonable expectation

of privacy in the bag, i.e., that he abandoned it.

To hold otherwise would be contrary to the cases cited and contrary to public policy. Allowing schemes such as appellants' to succeed would not deter improper police conduct, but would reward defendants who initially indicate that property is abandoned but who later claim Fourth Amendment protections after contraband is found pursuant to a warrantless search.

The question of whether Akers abandoned the suitcase is more difficult. However, on the facts of the case and according to the objective test for intent, we find that Akers also abandoned the suitcase. Although never questioned about the "Estrada" bag, Akers observed Kendall disclaim interest in it. When detained shortly afterward, Akers consented to a search of his suitcase but concealed the

fact that he carried the claim check for the "Estrada" bag.

When these facts are coupled with the information that no one on the flight was named "Estrada" we cannot say that the trial court erred in finding abandonment.

Conclusion:

The trial court's finding of abandonment is a factual finding and, even where arguably mixed with questions of law, is subject to attack only if clearly erroneous. See United States v. Hart, 546 F.2d 798, 801-02 (9th Cir. 1976)(en banc), cert. denied, 429 U.S. 1120, 97 S.Ct. 1155, 51 L.Ed.2d 571 (1977). We are further aware of the Supreme Court's admonishment in Ker v. California, 374 U.S. 23, 33-34, 83 S.Ct. 1623, 1629-1630, 10 L.Ed.2d 726 (1963).

> . . . While this Court does not sit in nisi prius to appraise

> contradictory factual questions, it will where necessary to the determination of constitutional rights, make an independent examination of the facts, the finding, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental -- i.e., constitutional -- criteria established by this Court have been respected.

We have made such an independent examination and hold that the trial court did not err in concluding that both Kendall and Akers abandoned the suitcase. Appellants' motions to suppress were properly denied and their judgments of conviction were properly entered. Accordingly, the judgments of conviction are hereby affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 80-1306
Plaintiff/ Appellee,	)	D.C. No. 79-0878
v.	)	
PETER M. KENDALL,	)	ORDER
Defendant/ Appellant.	)	

Before: Nelson and BOOCHEVER, Circuit Circuit Judges, and WILLIAMS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing,

---

* Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.